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In the Supreme Court of the United States

OCTOBER TERM, 1990

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

BRIEF OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, ET AL. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents Northwest Forest Resource Council, Huffman & Wright Logging Co., Freres Lumber Co., Inc., Lone Rock Timber Co., Inc., Scott Timber Co., Clear Lumber Manufacturing Corp., Yoncalla Timber Products, Inc., Cornett Lumber Company, Inc., Douglas County Forest Products Company, Medford Corporation, Rogge Forest Products, Inc., Washington Contract Loggers

Association and William Pickell (hereafter collectively referred to as "NFRC"),[1] defendants-intervenors-appellees below,[2] submit this brief in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by the Solicitor General on behalf of F. Dale Robertson and Manuel Lujan, Jr.[3]

STATEMENT OF THE CASE

NFRC adopts the Statement of the Case set forth in the petition.

NFRC supplements the Statement of the Case in the petition as follows:

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[1] None of the respondents has any parent, subsidiary or affiliated corporation except Lone Rock Timber Co., Inc. is an affiliate of Sun Studs, Inc. and Scott Timber Co. is an affiliate of Roseburg Forest Products Co.

[2] At the time the Ninth Circuit issued the ruling for which review is sought, respondents Washington Contract Loggers Association and William Pickell were plaintiffs-appellees in Civil No. C89-99T(WD) in the Western District of Washington, which was consolidated with *Seattle Audubon Society v. Robertson*, Civil No. C89-160WD. Subsequently, Civil No. C89-99T(WD) was dismissed and these parties were allowed to intervene in Civil No. C89-160WD as defendants-intervenors.

[3] Respondents NFRC received the Solicitor General's petition on April 24, 1991. Under Sup. Ct. R. 12.4 this response is being filed within 20 days after the date of receipt.

A. Background of federal timber sale programs.

In 1897 Congress authorized the establishment of national forests "to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C.A. § 475 (West Supp. 1991). For almost a century the national forests have served as an important source of timber supply for the American people.

The national forests of the Pacific Northwest are America's most abundant source of public timber, supplying almost half of the entire Forest Service national timber sale program.[4] Twenty-three national forests in Washington, Oregon and northern California supplied approximately five billion board feet[5] of timber per year to the American people in the 1980s.[6]

In western Oregon the Department of Interior Bureau of Land Management operates a separate timber sale program under the authority of the Oregon and California Lands Act, 43 U.S.C. § 1181, *et seq.* (West

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[4] Forest Service, United States Dep't of Agriculture, *The Forest Service Program for Forest and Rangeland Resources: A Long-Term Strategic Plan*, 6-16 (1990).

[5] A board foot is a measure of volume of wood equal to one foot by one foot by one inch.

[6] Forest Service, United States Dep't of Agriculture, *Production, Prices, Employment, and Trade in Northwest Forest Industries, Second Quarter 1990*, Table 15 (1990) ("*Production, Prices*").

Supp. 1991), which contributes an additional one billion board feet of federal timber every year.[7]

The forest products industry in Washington and Oregon employed over 133,000 workers in 1990.[8] Every million board feet of timber sold by the Forest Service or BLM contributes approximately nine full-time jobs to the industry for one year.[9]

Both the Forest Service and the BLM offer all their timber for sale to the highest bidder on a competitive bid basis, with as many as ten companies bidding on a single "timber sale," usually comprising several million board feet of timber. In 1990, the Forest Service sold Douglas fir logs in Washington and Oregon at approximately $550 per thousand board feet.[10] The revenue from these competitive auctions allows the Forest Service to contribute over $400 million per year to the federal treasury in proceeds from its Pacific Northwest timber sales.[11] Additional millions of dollars of federal income tax revenues are generated by the employment created from these timber sales.

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[7] *Id.*, Table 15.

[8] *Id.*, Table 20.

[9] *Id.*, Table 15, Table 20.

[10] *Id.*, Table 74.

[11] Forest Service, United States Dep't of Agriculture, *Timber Sale Program Information Reporting System, Regional Summary, Fiscal Year 1989*, Appendix B at 3 (March 8, 1990).

Forest Service and BLM timber provides more than one-third of all timber harvested in the Pacific Northwest,[12] a greater proportion than in other parts of the country. The result has been the growth of a large component of the forest products industry in the Pacific Northwest which owns no private timber and depends largely or completely on purchases of federal timber for the source of raw materials to operate their mills. Many of these federally-dependent mills are small, independent, family-owned businesses which have operated in timber-dependent communities for decades.

Congress has recognized the dependence of the small mills on federal timber by establishing a "small business set-aside" program administered by the Small Business Administration which guarantees that certain proportions of federal timber sales may be purchased only by companies qualifying as a small business under the program, thus assuring a steady supply of timber for these small companies. *See Duke City Lumber Co. v. Butz*, 382 F. Supp. 362 (D.D.C. 1974), *aff'd* 539 F.2d 220 (D.C. Cir. 1976), *cert. denied sub nom*, *Duke City Lumber Co. v. Knebel*, 429 U.S. 1039 (1977).

Thirteen of the most productive national forests in the "Douglas fir" region west of the Cascade mountains in Washington and Oregon provide habitat for the northern spotted owl, as do all six of the BLM's administrative

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[12] *Production, Prices*, Table 74.

districts in western Oregon.[13] In 1989 litigation relating to the spotted owl substantially disrupted the Forest Service and BLM timber sale programs in these areas, cutting off several billion board feet of timber sales which had been expected to be offered that year. Congress responded directly to this disruption by enacting Section 318 of the Department of the Interior and Related Agencies Appropriations Act, Fiscal Year 1990, Pub. L. 101-121, 103 Stat. 745 (1989) ("Section 318").

B. The 12 enjoined timber sales.

On December 18, 1990, following the remand from the Ninth Circuit judgment of September 18, 1990, as amended on October 31, 1990, the District Court for the Western District of Washington issued a permanent injunction against the award of 12 timber sales which the Forest Service had prepared, advertised and competitively auctioned in September, 1990 under the authority of Section 318. The 12 sales are located in the Siskiyou, Siuslaw and Willamette National Forests in Oregon within the Douglas fir region. The combined volume of timber in the 12 sales is 83,687,000 board feet. Docket No. 686 (Declaration of Kathy O'Halloran, October 22, 1990, Exhibit A). Based on the most recent sale price of $550 per thousand board feet for Douglas fir logs, these 12 sales can be expected to produce over $46 million of revenue for the federal government. Of these funds, 25% -- over $11 million -- would be paid to local counties in

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[13] Four national forests in northern California which also provide habitat for the northern spotted owl are not involved in this appeal.

lieu of property taxes. 16 U.S.C. § 500 (West Supp. 1991).

C. The six challenged timber sales.

In addition, Seattle Audubon Society challenged six other timber sales which the Forest Service offered for purchase in September, 1990. On September 29, 1990, the District Court for the Western District of Washington dismissed the challenges to the six sales on the ground that they were untimely under Section 318(g)(1).

On April 26, 1991, the Court of Appeals for the Ninth Circuit reversed the district court and ruled that the challenges to these six sales could proceed under the doctrine of equitable tolling despite the statutory time limit. These six timber sales, from the Mt. Baker-Snoqualmie, Willamette, Siuslaw, Wenatchee and Rogue River National Forests of Washington and Oregon, within the Douglas fir region, include approximately 25,540,000 board feet of timber. At the $550 per thousand board foot price the sales would produce over $14 million of revenue for the federal government.

Five of these six sales have been awarded to the high bidder at the auction. In each case the high bidder has been required to provide the Forest Service with a substantial down payment and large performance and payment bonds to assure successful completion of the contract. The district court has not yet ruled on the merits of the Audubon Society challenge to the six sales.

The Ninth Circuit opinion of April 26, 1991 on equitable tolling may allow challenges to other timber

sales auctioned and awarded under Section 318. To date, no such additional challenges have been filed.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The decision below held an important act of Congress unconstitutional based on a plainly erroneous reading of the statute and a clear misinterpretation of governing principles of statutory construction.

A. The decision below plainly misinterpreted Section 318 by failing to understand that Congress substituted a statutory owl management plan for fiscal year 1990 in place of the agency plans which were challenged in the pending litigation, and in doing so temporarily repealed other applicable environmental laws.

Congress enacted Section 318 in the face of legal challenges to discretionary agency management plans designed by the Forest Service and the BLM to protect spotted owls. To achieve a "1-year breathing space," 135 Cong. Rec. H6506 (daily ed. October 3, 1989) (remarks of Rep. AuCoin), in this litigation, Congress took the simple step of substituting -- for fiscal year 1990 only -- a nondiscretionary statutorily mandated spotted owl management plan which the agencies were required to follow. Congress based its plan on the existing agency plans, but expanded the protected areas by more than 300,000 acres.

The unmistakable intent of Congress was that timber sales could go forward if they complied with the statutory plan. This clear intent is manifested by the words of the

statute and repeated in the legislative history. The statute:

- *Requires* the Forest Service to offer 7.7 billion board feet of timber sales and the BLM to offer 1.9 billion board feet of timber sales, Section 318(a)(1), (2); and

- *Prohibits* such sales from occurring in the areas that were statutorily designated for spotted owl protection, Section 318(b)(3), (5).

Congress' mandate to each agency to sell the specified volume of timber outside the designated areas of protection could only mean that the agencies need not comply with the otherwise applicable environmental laws in making those sales, since it was the legal challenges under these very laws that had disrupted timber sales in 1989 and created the crisis which Section 318 was intended to resolve. Leaving the existing laws in effect, as the Ninth Circuit concluded had been intended by Congress, would mean that Section 318 had accomplished nothing -- an intent which cannot be attributed to Congress.

Congress' evident intent was that adherence to the Section 318 spotted owl plan made it unnecessary to comply with other existing environmental laws relating to spotted owls. Section 318 can only be understood as a temporary repeal of those other laws. While words of repeal are not expressed in the statute, the intent to enact such a repeal cannot seriously be argued.

B. The Ninth Circuit mistakenly believed that it could not find Section 318 to be an implied repeal of other environmental laws.

Despite the evident congressional intent to override other environmental laws to the extent necessary to achieve the mandated timber sale levels in Section 318, and despite the Ninth Circuit's recognition of its duty to interpret a statute in a manner that renders it constitutional, the Ninth Circuit held that it was *barred* from adopting a "saving interpretation of subsection (b)(6)(A)" as a temporary repeal of the underlying laws in the pending litigation. App. 16a.[14] It reached this conclusion based on a plainly erroneous belief that Congress *cannot* repeal a substantive law *by implication* in an appropriations measure. *Id.* Applying this rule, the Ninth Circuit held itself constrained to adopt a construction of the statute which, in its view, renders it unconstitutional. *Id.*

The Ninth Circuit's rule of statutory interpretation regarding appropriations measures is contrary to 100 years of precedent from this Court and many lower courts. Congress has on many occasions repealed substantive laws by implication in appropriations acts, and never before this case has a court suggested that Congress lacks the power to do so.

In *Mathews v. United States*, 123 U.S. 182 (1887), the Supreme Court held that an appropriations act had "repealed, by necessary implication" earlier substantive

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[14] References to "App." are to the Appendix attached to the Solicitor General's Petition.

laws that were contrary to the terms of the appropriations enactment. *Id.* at 186. *Accord, United States v. Mitchell*, 109 U.S. 146, 149-50 (1883) (appropriations act passed by Congress in 1881 had by implication repealed a contrary provision of earlier substantive law).

In *United States v. Dickerson*, 310 U.S. 554 (1940), the Court held that Congress had repealed a substantive law by implication through the enactment of an appropriations act with contrary language, a conclusion based not on an explicit repeal but on "a considered weighing of every relevant aid to construction." *Id.* at 562 (footnote omitted).

In *United States v. Will*, 449 U.S. 200 (1980), the Court again held that Congress had repealed an earlier substantive law by implication through the enactment of appropriations measures with contrary language. *Id.* at 222-24. *Will* clearly illustrates the difference between the rule adopted by the Ninth Circuit in this case and the proper rule as enunciated by this Court. *Will* states that repeals by implication are "not favored," especially when the repealing measure is in an appropriations bill. *Id.* at 221-22. Nonetheless, the Court in *Will* found that in the statutes in question Congress *had* enacted a repeal by implication of the law in question. *Id.* at 222-23.

In contrast, the decision below held that repeals by implication in an appropriations act are not merely disfavored, but are *prohibited*. App. 16a. It refused to consider whether subsection (b)(6)(A) repealed substantive laws by implication on the ground that Congress had

no right to do so and therefore the statute could not have that effect. *Id.*

While the decision below cited *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), in support of its rule, *Hill* fails to support the decision below; it merely agrees with *Will* that repeals by implication are *disfavored* in an appropriations act -- not *prohibited*. The *Hill* court agreed that Congress *could* repeal a substantive law by implication in an appropriations act, but held that it had not done so in that case. *Id.* at 190-193.

The only other authority cited by the court below, *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied*, ___ U.S. ___, 109 S. Ct. 3229 (1989) also fails to support this doctrine. *Portland Audubon* merely holds that the law in question *did not* repeal any law by implication, not that such a repeal is prohibited.

Other courts of appeals have reached contrary results on this issue. "Appropriations acts are just as effective a way to legislate as are ordinary bills relating to a particular subject. An appropriation act may be used to suspend or modify prior Acts of Congress." *Friends of the Earth v. Armstrong*, 485 F.2d 1, 9 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974). *Accord*, *United States v. Burton*, 888 F.2d 682 (10th Cir. 1989); *Republic Airlines, Inc. v. United States Dep't of Transp.*, 849 F.2d 1315 (10th Cir. 1988); *American Fed'n of Gov't Employees v. Campbell*, 659 F.2d 157 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 820 (1981); *Director, Office of Workmen's Compensation Program v. Alabama By-Products Corp.*, 560 F.2d 710, 719 (5th Cir. 1977).

The petition should be granted to reconcile the decision below with these many conflicting authorities.

C. *The Ninth Circuit's flawed constitutional analysis led it to plainly misinterpret Section 318 by holding that the statute mandates findings of fact in pending litigation.*

Finding that it was unable to give Section 318 the interpretation clearly intended by Congress as a temporary repeal of other applicable environmental laws, the Ninth Circuit interpreted the statute to "direct[] the court to reach a specific result and make certain factual findings" in the two pending district court cases. App. 14a.

Yet in fact neither of the district courts ever reached any "specific result" or made any "findings" pursuant to the statute. The district court in Washington did nothing all year with regard to the challenge to the Forest Service plan, other than decline to resolve the merits of the case on summary judgment. The district court in Oregon dismissed the case as moot on jurisdictional grounds without making any findings at all.

If the supposed evil of this statute was that it compelled district courts to make certain findings of fact and to reach certain results, App. 15a, then the evil never occurred.

The reason neither district court made any rulings or findings on the merits of the two cases, a reason apparently overlooked by the Ninth Circuit, is that the beginning phrase of subsection (b)(6)(A) explicitly states that

the statute is ***not*** "passing on the legal and factual adequacy" of the Forest Service and BLM spotted owl plans challenged in the two case. Congress explicitly directed that the courts were ***not*** to draw any conclusions or make any findings concerning the two challenged plans based on this statute.

The Ninth Circuit apparently overlooked this phrase of the statute. In footnote 3 of the opinion below, App. 16a, the court quotes virtually identical language in the Conference Report on the statute, but declines to ascribe significance to it because of supposedly conflicting legislative history. *Id.* The Ninth Circuit was apparently unaware that the same words appear in *the statute*, where they must be given effect. The Ninth Circuit never addressed this part of the law.[15]

D. The Ninth Circuit overlooked the explicit bar to judicial review in subsection (b)(6)(A).

The Ninth Circuit failed completely to address the alternative basis for upholding the constitutionality of subsection (b)(6)(A) -- the statute's explicit prohibition of judicial review of the statutory guidelines. The last sentence of subsection (b)(6)(A) states: "The guidelines

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[15] The supposedly conflicting legislative history is not conflicting at all. Congress did not intend Section 318 to alter the application of environmental laws to the earlier ***agency*** management plans, but explicitly stated in the challenged portion of subsection (b)(6)(A) that the ***statutory*** management plan for fiscal year 1990 adopted ***in place of*** the challenged agency plans met all requirements of the environmental laws. The legislative history merely confirms the distinction Congress drew between the statutory plan and the prior agency plans.

adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States." This explicit withdrawal of jurisdiction is the type of enactment which has been upheld throughout the history of our nation. *Glidden Co. v. Zdanok*, 370 U.S. 530, 567 (1962); *In re Hall*, 167 U.S. 38, 42 (1897). Yet the decision below effectively allowed the district court to nullify the statutory guidelines by allowing legal challenges to timber sales that fully complied with the guidelines.

Since the statutory guidelines were in effect during fiscal year 1990 rather than the challenged agency plans, and since judicial review of the statutory guidelines was explicitly barred by the statute, the courts lacked jurisdiction to take any action in these cases during fiscal year 1990 -- and were jurisdictionally barred from making the findings supposedly compelled by the statute. The Ninth Circuit never addressed this explicit bar on judicial review.

CONCLUSION

The Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

Dated this 14th day of May, 1991.

Respectfully submitted,

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